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CHARLES ELMORE

No. 334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

HANS REES' SONS, INC., *Appellant*

vs.

STATE OF NORTH CAROLINA, ON THE RELATION OF ALLEN J. MAXWELL, COMMISSIONER OF REVENUE, *Respondent*

BRIEF OF APPELLEE ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF AND ARGUMENT FOR APPELLEE

This cause is brought to this court on appeal from the judgment in the Supreme Court of North Carolina, sustaining the Income Tax in question, the opinion to be found in 199 N. C., 42 and (Rec., pp. 156 to 166, inclusive).

The action was originally constituted by appealing from the judgment of the Commissioner of Revenue of North Carolina to the Superior Court of Buncombe County, under the machinery provided in sections 700 and 701 of the Revenue Act of 1925, chapter 101 Public Laws.

In the Superior Court of Buncombe County, the cause was submitted to the court on a waiver of jury trial with the judge to find the facts. The judgment of his Honor is found (Rec., p. 93). The following admissions were made by the Hans Rees' Sons, Inc., in that court (Rec., p. 93):

"It being admitted that the Commissioner of Revenue, in assessing the tax complained of, was following the method set forth in section 311 of the Revenue Act of 1927, chapter 80 Public Laws, and certain sections of the acts of 1923 and 1925, and that the valuation fixed for the real estate and tangible property of the complaining taxpayer, both within and without the State, is admitted to be correct, and that the total net income of the complaining taxpayer, used for the basis of calculation by the Commissioner of Revenue, is admitted to be correct and that the allocation thereof for the purposes of taxation was made in accordance with the method indicated in the statute referred to, etc."

Interpreting these admissions, in connection with the finding of fact and conclusions of law by the Commissioner of Revenue (Rec., pp. 64 to 68, inclusive), we find this situation:

That the complaint of the increased assessment for income taxes of 1923, 1924 and 1925 was based, not upon the unconstitutionality of the act in its application to the appellant, but because the Commissioner of Revenue deducted from the report, as made by the appellant, the value of certain intangibles, which were used in that report to increase

the amount of the property of the appellant, situated without the State.

The effect of this, we submit, is to eliminate from the consideration of this court the amounts claimed to have been illegally assessed in 1923-24-25 and to leave only the amount of $3,651.40 assessed for 1926.

The following is an itemized statement of the whole transaction, so that the court may have clearly before it the figures upon which the Department of Revenue acted:

1923

Income—original return		$ 230,279.40
North Carolina income		131,996.15
Upon investigation, bad debts reclaimed included	$2,552.50	
Dividends allowed as a credit	904.00	
Corrected Income:		231,927.90
Total value of property—original return		1,582,297.99
Total value of property—revised return		1,148,114.14
Original percentage .5732%		
Revised percentage .837 %		
Original tax paid (not protested)		3,959.88
Additional tax paid (Protested)		1,863.73
Interest (Protested)		260.92
Total		$ 2,124.65

1924

Income—original return		$ 253,921.82
North Carolina income		174,063.41
Upon investigation income tax deduction restored to income	$3,959.88	
Corrected Income		178,023.29
Total value of property—original return		2,241,654.94
Total value of property—revised return		1,792,110.61
Original percentage .6855%		
Revised percentage .8589%		
Original tax paid (Not protested)		5,221.90
Additional tax paid (Protested)		1,422.94
Interest (Protested)		13.83
Total		$ 1,536.77

1925

Income—original return		$ 139,043.43
North Carolina income		86,332.06
Upon investigation income tax deduction restored to income	$5,221.90	
Corrected income		91,553.96
Total value of property—original return		2,293,929.85
Total value of property—revised return		2,147,097.13

Original percentage .6209%	
Revised percentage .6632%	
Original tax paid (Not protested)	3,453.28
Additional tax paid (Protested)	435.40
Interest (Protested)	8.71
Total	$ 444.11

1926

Income—original return	$ 106,727.55
North Carolina income	91,286.48
Not investigated:	
Percentage .8553226%	
Tax paid (Protested)	3,651.46

It is thus apparent that all the increase claimed by appellant to the income tax for the various years involved was caused by an application of the act and a proper allocation of net income thus arrived at. There was no complaint of the unconstitutionality of the act, at the time of the first payment for the years 1923-24 and 25. That amounted, in practical effect, to an admission that the act was constitutional in reference to such payment and so, we submit, it could not be unconstitutional against these appellants by reason of the fact that the proper statement of the assessment should produce more revenue, particularly when this proper statement is directly admitted by the appellant in the court below.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS APPEAL

It is provided in section 3 of Article 5, as follows:

"The General Assembly may also tax trades, professions, franchises and incomes: provided the right of tax on incomes shall not in any case exceed 6%, and there shall be allowed the following exemptions, to be deducted from the amount of annual income, to-wit: a married man with wife living with him, or a widow or widower having a minor child or children, natural or adopted, not less than $2000; to all other persons not less than $1000, and there may be allowed other deductions (not including living expenses), so that only net incomes are taxed."

The statute involved is the Revenue Act of 1925, chapter 101 Public Laws. So far as the years 1923 and 1924 are involved, cognate sections of the Revenue Act of 1921, chapter 34 Public Laws and of the Revenue Act of 1923, chapter 4 Public Laws, with cognate sections in each case, are practically identical with the Revenue Act of 1925.

Section 104 of the act declares as follows:

"The general purpose of this act is to impose a tax for the use of the State Government upon the net income for the calendar year 1925 in excess of exemptions herein set out, collectible in the year 1926 and annually thereafter * * * of every foreign corporation and of every non resident individual having a business or agency in this State in pro-

portion to the net income of such business or agency."

Section 201 of the Revenue Act of 1925, the section particularly applicable to the instant case, is as follows:

"Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:

"(a) In case of a company other than companies mentioned in the next succeeding section, deriving profits principally from the ownership, sale or rental of real estate or from the manufacture, purchase, sale of, trading in, or use of tangible property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such company in the income year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

"(b) In case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this State for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the State.

"(c) The words 'tangible personal property' shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise and shall not be taken to mean money deposits in banks, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt.

"(d) Foreign insurance companies doing business in this State and returning premium receipts to the insurance commissioner and paying the tax upon such premium receipts as provided in section seventy of this act shall be exempt from this tax."

"Net income" is defined in section 300 as follows:

"The words 'net income' mean the gross income of the tax payer less deductions allowed by this act."

Section 301 defines "gross income" as follows:

"The words 'gross income' mean the income of a taxpayer derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid,

or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains, or profits, and income derived from any source whatever. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this act, any such amounts are to be properly accounted for as of a different period."

Such section permits deductions set out therein, but these are not material to this appeal.

Section 306, in computing net incomes, allows certain deductions. Stated shortly, some of these deductions particularly applicable to the instant case are:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including sub section (c) as to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income;

2. Rentals or other payments required to be made as a condition of the continued use or possession for the purposes of the trade

or property to which the taxpayer has not taken or is not to take title or in which he has no equity;

3. All interest paid during the income year on indebtedness;

4. Taxes for the income year, except taxes on income, inheritance taxes and taxes assessed for a local benefit of a kind tending to increase the value of the property assessed;

6. Losses sustained during the income year of property used in trade or business;

8. A reasonable allowance for the depreciation and obsolescense of property used in the trade or business.

It is stated at page 7 of appellant's brief:

"There is no dispute as to the amount of appellant's gross or net income, nor that the computation of the tax was made in conformity to the statute."

So, it may be taken as admitted that all the deductions allowed by the statute have been made and that, therefore, the action of the Commissioner of Revenue, hereinbefore stated, in increasing the amount of the taxes for the years 1923-24 and 25 by refusing to allow the inclusion of intangible property in estimating the value of the property out of the State, under the rule of allocation, and by the exclusion of the deduction claimed for the payment

of income taxes, were all legal and valid rulings by the Commissioner of Revenue.

There can, therefore, be no doubt that the statute itself is constitutional on its face. The counsel of appellant (Rec., p. 6 of their brief) state the question which they conceive is presented to the court on this appeal, as follows: "This case presents a question, heretofore left undecided by this court, whether such statute is arbitrary and unconstitutional when the record shows that it results in fact in an unreasonable and unjust tax and imposes a burden upon a much larger percentage of income than in fact had its source in the state." The statement, thus made, is, in reality, a begging of the question. We deny distinctly that the record shows that the application of the tax in the instant case results in unreasonable and unjust tax and imposes a burden upon a much larger percentage of income than in fact had its source in this State.

We deny distinctly that the record shows either one of these facts assumed to be true in the statement of the question involved.

The defendant's counsel could not contend, in the face of *Underwood Typewriter Co. vs. Chamberlain*, 254 U. S., 113, that this act, on its face, was not constitutional. Their contention, then, presents only the question whether, under the facts contained in the record, the appellant occupied such a peculiar relationship to the statute as to render it unconstitutional to enforce it against it.

STATEMENT OF FACTS RELIED UPON BY APPELLANT AS TAKING IT WITHOUT THE STATUTE.

The appellant is a corporation organized under the laws of New York and having domesticated in North Carolina, conducts a large tannery in or near the city of Asheville, N. C. All its tanning operations are carried on at this tannery. At one time, the appellant had various tanneries elsewhere than in the State of North Carolina. It had, however, given up these before 1923. It did no manufacturing elsewhere than in the State of North Carolina, except that it finished the belt leather partially in North Carolina and partially in New York. Its principal office is located in New York City. Three salesmen travel out from that office, covering the entire United States. It does both a wholesale and retail business in its manufactured products. Its wholesale business consisted largely in goods sold to shoe manufacturers, certain parts of the hide and other various classes of leather-grade leather, and so on. This was usually sold in bulk car load lots. Its retail business consists of the sale of the better portion of the hide which is cut up into smaller pieces. It is finished in various ways and manners and is sold in less than car load lots. This is called "curried special leather."

It maintains in New York, a warehouse, which is supplied from the tannery at Asheville. As a rule, it kept a very small amount of supplies in the New York warehouse. Orders for wholesale shipments

go from the tannery in Asheville. About 40 or 50% of the output of the plant at Asheville is shipped from the Asheville tannery to New York and the other 60% is shipped direct on orders from New York. A very small part of the output of the Asheville plant is shipped to customers within the State of North Carolina.

Much of the evidence relates to the superior purchasing capacity of the appellant by which it secures raw materials, such as hides, etc., and the chemicals which enter into the tanning process, cheaper than the market price. Much is addressed, also, to the fact that the sales of the manufactured product-leather, are largely made out of the State of North Carolina, though all the orders are filled directly from Asheville, or indirectly from the New York warehouse, which is constantly supplied from Asheville. This is accompanied by an attempt to split up its annual income into three parts:

1st. That derived from superior ability to purchase raw material and other material necessary to manufacture leather;

2nd. That derived from the actual sale of the manufactured product, and

3rd. The income derived from manufacturing at Asheville (Rec., pp. 109 to 113, inclusive and 115).

POINTS FOR ARGUMENT

1. This is not such a controversy as would permit the introduction of parol evidence of the class relied upon by the appellant to show that the statute involved is unconstitutional in its incidence upon the appellant.

2. If, however, such evidence was admissible in the instant case, it does not show that the appellant was arbitrarily deprived of his property or that the income assessed was partly derived from transactions without the State or was excessive in such way as to constitute taking of appellants property without due process of law.

ONE

This is not such a controversy as would permit the introduction of parol evidence of the class relied upon by the appellant to show that the statute involved is unconstitutional in its incidence upon the appellant.

The general rule is thus stated in *Powell vs. Pennsylvania*, 127 U. S., 678:

> "The legislative determination of such question (of fact) is conclusive upon the courts, unless it appears upon the face of the statute, or from the facts of which the courts must take judicial cognizance, that the statute infringes rights secured by the fundamental law."

See, also, 6 RCL section 112.

On this appeal, however, there is no attack upon the constitutionality of the statute involved upon its general application. It is, indeed, admitted that it is constitutional and as a matter of fact, this court has held an identical statute constitutional in *Underwood Typewriter Co. vs. Chamberlain*, 254 U. S., 113. The contention is that the appellant is so related to the particular act that the assessment of an income tax upon it, under the rules provided in the statute, results in arbitrariness so unreasonable as to constitute it a taking of its property without due process of law. The burden, of course, was upon the appellant to show this beyond a reasonable doubt, if permitted to show it at all.

Arkansas Natural Gas Co. vs. Railroad Commission, 261 U. S., 379.

Thomas vs. Kansas City So. Ry. Co., Idem, 481.

Missouri Pac. Ry. Co. vs. Boone, 270 U. S., 466.

Panama Ry. Co. vs. Johnson, 264 U. S., 375.

A consideration of the constitutional provision and the statutes of North Carolina, enacted in pursuance thereof in an attempt to tax net income earned in the State, will show that these statutes operate generally upon all such income earned in the State. There is no complaint, on this appeal, of the administration of the act by the appellee, the Revenue Commissioner of North Carolina. He, therefore, in assessing this income tax, was acting upon direct

authority of the statute, which has been adopted as a practical method of arriving at income of foreign corporations manufacturing raw products into finished goods in the State of North Carolina. This statute does not discriminate against non-resident corporations, is not in any sense a burden upon interstate commerce, does not tax property beyond the taxing jurisdiction of the State, nor income not earned in the State, and, consequently, in itself, does not offend against the Fourteenth Amendment.

This court recognizes the fact that no taxing act can be drafted, with mathematical certainty as not to impose some hardship upon property or persons located near its border line. Legislatures cannot be wiser than Providence, who permits the rain to fall upon the just and unjust. No taxing law can be provided, which, in all particulars will operate similarly and equitably upon all the subjects of taxation. These taxing laws being drawn to meet all the conditions that may arise are, from their nature, rough-hewn, not, in the language of St. Paul, "fitly joined together." In nearly all instances, then, if not all, there is an apparent hardship imposed upon particular taxpayers by the very nature of the act itself. Particularly is this true in the enactment and administration of income tax laws. Thus, Judge Brandeis, in a note to *Atlantic Coast Line R. R. Co. vs. Doughton*, 262 U. S., 413, says:

> "The term 'net income' in law or in economics has not a rigid meaning. Every income tax act necessarily defines what is in-

cluded in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income is exempt from taxation. These details are largely a matter of governmental policy. As to them, states differ; and there is apt to be a difference of view in the same states at different times and, at the same time, a different definition of taxable net income for different classes of taxpayers. Obviously such differences in detail do not render obnoxious to the commerce clause a state income tax which is otherwise objectionable."

Again, it is said in *General American Tank Car Corp. vs. Day*, 270 U. S., 367:

"In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minut differences between its application in practice and the application of the taxing statute or statutes to which it is complementary."

See, also,

State R. R. Tax Cases, 92 U. S., 575.

Traveler's Ins. Co. vs. Commonwealth, 185 U. S., 364.

Shaffer vs. Carter, 252 U. S., 37.

In *Metropolis Theatre vs. Chicago*, 228 U. S., 61, it is said:

"To be able to find fault with a law is not to demonstrate its invalidity * * * The problems of government are practical ones and may justify, if they do not require, rough accommodation—illogical it may be and unscientific."

While the court considers taxing laws from the standpoint of their practical operation, it does so on broad general lines and upholds them when not plainly arbitrary and discriminatory.

St. Louis, etc. R. R. Co. vs. Arkansas, 235 U. S., 350.

Rogers vs. Hennepin County; 240 U. S., 184.

Gen'l Am. Tank Car Corp. vs. Day, 270 U. S., 367.

Minor inequalities and hardships are incident to every system of taxation, but do not render the legislation obnoxious to the Federal Constitution.

So. Ry. Co. vs. Watts, 260 U. S., 519.

Now, in the instant case, the returns for income tax made by the appellant for the years 1923, 24, 25 and 26 appear together with the calculations made by the Department of Revenue (9 to 35 of the record). Those returns show a considerable excess of the fair cash value of real estate and tangible personal property in the State, as compared with its total real estate and tangible personal property wherever located. It should be noticed, just here, that the

effect of the application of the statute to appellant was to make the real and personal property located out of the State a factor in determining the amount of the income tax. Of course the greater amount of this property out of the State would lessen the amount of income tax automatically. There is no complaint, we repeat, by the appellant of the actual administration of the law by the Revenue Department of the State. We submit, therefore, that as the appellant conducted its manufacturing business in North Carolina wholly and the factory was the source of its supplies and the act having been properly applied by the Commissioner of Revenue, none of the evidence offered by appellant was material in the sense that it showed in any way arbitrariness from the necessary operation of the act itself, under the principles hereinbefore stated. In other words, the act having been administered in good faith, the inequalities, if any, complained of by the appellant, were only those which resulted from the operation of a general, though valid, law.

TWO

If, however, such evidence was admissible in the instant case, it does not show that the appellant was arbitrarily deprived of his property or that the income assessed was partly derived from transactions without the State or was excessive in such way as to constitute taking of appellant's property without due process of law.

For two reasons, this is true:

(a) Taking that evidence at its highest value for the appellant, it shows simply that the defendant purchased material—hides—outside of the State of North Carolina at an amount appreciably less than the market price.

(b) That he sold his manufactured product outside of the State of North Carolina; that he could have had these hides tanned under contract by other tanners, consequently, the difference between the actual cost of tanning and the contract price of having it done at other tanneries, constituted the actual earnings of the Asheville tannery.

This is a patent attempt to divide into parts what is essentially one whole. It is to separate the mere incidents from the main factor in the proposition and omit the main factor itself. It is a rather extraordinary suggestion that the profit of the manufacturing corporation, when it does its own manufacturing for the purpose of sale, should be limited by the difference between what it cost it to manufacture and what it would have cost it to have the manufacturing done by another concern under contract. Every purchase of raw material was as a matter of fact, made for the benefit of the factory at Asheville and that factory was the only one operated by appellant. The sale of the manufactured product was made, also, for the benefit of the tannery itself. The manufacture itself, entirely divorced from the purchase of the raw material and the sale of the

manufactured product, would be like Mahomet's coffin, hung up in the air between the heaven of profit and the earth of no profit. The truth is, the purchase of raw material, manufacture of raw material and the sale of the manufactured product are what this court calls "a unitary business."

The court, in *Bass, Ratcliff & Greton vs. Tax Com.*, 266 U. S., 271, at page 282, said:

> "So, in the present case, we are of opinion that as the company carried on a unitary business of manufacturing and selling ale in which its profits were earned by a series of transactions, beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacture resulting in no profits at all until it ends in sale—the State was justified in attributing to New York a just appropriation of the profits earned by the company from such unitary business."

In that case, the plaintiff was a British corporation, engaged in brewing and selling Bass' Ale. All of its brewing was done and a large part of its sales were made in England, but it imported a portion of this product in the United States, which was sold from branch offices only located in New York City.

The Tax Commission of New York undertook to levy a franchise tax upon the corporation measured by levying 3% upon its net income for the preceding year. This net income allocated to the State was to

be determined by the proportion which the aggregate value of specified classes of the assets of the corporation within the State bore to the aggregate value of all such classes of assets wherever located. Its entire net income from all of its business was $2,185,600. The aggregate value of its segregated property wherever located was $3,501,483. The value of its segregated assets in New York was $44,177. Taking the entire net income as a basis for the assessment of the tax, the proportion thereof allocated to New York amounted to $27,537.68. The 3% of this made the income tax which was levied and which the court sustained on the authority of the *Underwood Typewriter Co. vs. Chamberlain*, supra.

An inspection of the North Carolina statute shows on its face that it applies to all corporations. If it is a foreign corporation deriving profits from the manufacture, purchase, sale, dealing in or using tangible property, such proportion of its entire net income as the fair cash value of its real estate and tangible personal property in this State is to the fair cash value of its entire real estate and tangible personal property wherever located, is assigned to the State.

The statute, which was passed upon by the Court in the *Underwood Typewriter* case, supra, was very similar to the statute in the instant case, and indeed, the facts in that case are also similar.

The Supreme Court of Connecticut, which first passed upon the constitutionality of the Act, 94 Conn., 47, says, however, that the Connecticut statute

was not an income tax, strictly, but an excise tax for the privilege of doing business in a corporate capacity within the State. This aspect of the case, however, the Supreme Court of the U. S., at page 120, has put one side, as not necessary to reach an adequate conclusion. All the manufacturing by the *Underwood Typewriter Company* was done in the State of Connecticut. It was a Delaware corporation. It had a branch office in other States for the sale, lease and repair of machinery and the sale of supplies. The product manufactured in Connecticut was shipped direct to the branch offices, purchasers and lessees. Its total net profits amounted to $1,336,-586.13. The actual value of its real estate and tangible personal property in Connecticut was $2,-977,827.68. The value of similar property owned by it out of the State was $3,343,155.11. Thus, the proper proportion was 47 per cent. Applying this proportion to its net profits, stated above, from all sources, $629,668.50 was allocated to Connecticut under the statute as having been earned from the business done within the State.

The rate of the tax was 2 per cent. The tax, then, was $12,593.37. The company paid the tax, under protest, and brought suit to recover the whole amount, but the Court denied recovery, holding that the statute, as administered, offended against neither the commerce provisions of the Federal Constitution or the 14th Amendment, the Court saying:

"In support of its objection that business outside the State is taxed, plaintiff rests solely

upon the showing that of its net profits $1,293,643.95 was received in other States and $42,942.18 in Connecticut, while under the method of apportionment of net income required by the statute, 47% of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut, and ending with sale in other States. In this, it was typical of a large part of the business conducted in the State. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment, which, for all that appears in this record, reached and was meant to reach, only the profits earned within the State."

Not only do the facts of this case run on a parallel line with those that appear in the record in this appeal, but the reasoning of both the Connecticut Court, and of the United States Supreme Court fit, in a very definite way, the points presented on this appeal and, we submit, they are determinative of them.

THE TAX IN THE INSTANT CASE IS AN INCOME TAX UPON THE USE OF PROPERTY IN THE STATE AND NOT A FRANCHISE TAX

It is noticeable just here that, in North Carolina, there is no ad valorem tax levied for the support of the State. Such tax was eliminated for that purpose in 1921. The Income Tax Law, as hereinbefore quoted, requires the deduction of all taxes paid during the income year. As a consequence, in arriving at that portion of the income of the appellant to be assigned to North Carolina the local taxes paid by it were deducted.

In *Atlantic Coast Line vs. Doughton*, 262 U. S., 413, at page 420, this court calls a similar income tax a tax upon the net income of property, saying:

> "That a state may consistently, with the Federal Constitution, impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in *Shaffer vs. Carter*, 252 U. S., 37, 44, 52; 40 Sup. Ct., 221; 64 L. Ed. 445. There, an Oklahoma statute was sustained which laid the tax upon the net income of Oklahoma oil property owned by a citizen and resident of Illinois. The Federal Constitution which permits to be taxed the net income of property owned by an individual, although a citizen of another

state, obviously does not include such a tax where the property is owned or operated by a corporation. It is a common provision in State income tax laws to tax the net income of property within the state which is owned, or operated, by non-residents. The differences between the parties arise, in the main, not from difference in the method of determining what is net income, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. This will appear from an examination of the several grounds on which the validity of the statute is assailed."

It is clearly within the constitutional power of a State to levy an income tax on the net incomes earned within the State by persons and corporations engaged in interstate commerce, and that such a tax is not a burden on interstate commerce, and does not violate the commerce clause, because the net incomes taxed may be derived in part or mainly from the business of interstate commerce.

U. S. Glue Co. vs. Oak Creek, 247 U. S., 321.

Shaffer vs. Carter, 252 U. S., 37.

Underwood Typewriter Co., supra.

Travis vs. Yale & Towne Mfg. Co., 252 U. S., 60.

In *Alpha Portland Cement Co. vs. Massachusetts*, 268 U. S., 203, the court held unconstitutional the Massachusetts act, which imposed an excise tax on a foreign corporation for the privilege of doing business in the State, measured by the proportion of capital attributed to transactions within the State, and income derived therefrom when it was applied to a foreign corporation maintaining in the State only a local sales office from which its salesmen solicited orders, subject to approval at the principal office. This, however, was on the ground that the business itself was interstate commerce. The court, however, was careful to explain (Rec., p. 216) that the right to lay taxes on tangible property or on income was not involved. The distinction, so suggested, is brought out clearly by comparing this case with *National Leather Company vs. Massachusetts*, 277 U. S., 413. These cases also tend to illustrate the limits which the court would impose upon itself in permitting evidence in a particular case to show that a general statute, valid on its face, might be unconstitutional in its application to the facts of the particular case.

The injustice of the application, in the particular case, must be apparent and so gross as, in necessary effect, to deprive the particular taxpayer of his property without due process of law or deny to him the equal protection of the laws. The income tax, then, in the instant case, levied upon non-resident corporations in the manner provided in the act and under the circumstances set out in this case, is not an income

tax strictly upon the individual owner, but upon his property located in this State. This property is made a unit by the statute and, as such, pays income tax in accordance with the method provided in that statute. These considerations, we submit, distinguish this case from *Compania General de Tabacos de Filipinas vs. Collector of Internal Revenue*, 279 U. S., 306.

The case of *Wallace vs. Hines*, 253 U. S., 66, is valuable only as showing that the petition in the particular case set out facts which, admitted upon demurrer, justified the three judge court hearing the case to grant a temporary injunction. The mileage rule was adopted by the Legislature of North Dakota, in allocating the excise tax upon railroads in its application to foreign corporations, though the allegations, thus admitted, show that the mileage proportion was grossly unjust in determining the proportion of the property of the road to be allocated to the particular State for taxation. This case should be interpreted in connection with

Southern Railway vs. Watts, 260 U. S., 519.

The defendant's counsel, in their brief (Rec., 57 et seq) relied upon *Alpha Portland Cement Company vs. Knapp*, 230 N. Y., 48 as showing that in the determination of the amount of income from which was to be allocated a certain proportion to North Carolina, the Commissioner of Revenue added to the total amount of net income, dividends from

the stock of corporations owned by it and interest on securities owned outside of the State of North Carolina. The return of the appellant for income tax for the year ending December 31, 1926, is set out by the appellant at (Rec., pp. 31 to 35, inclusive). At the top of page 36 is the statement of dividends received from other than North Carolina corporations for the calendar year 1926—$840. This is the only allusion to such dividends. The rate of income taxes for the year 1926 was 4%. There is no evidence in the record that this was an independent, if not permanent, investment by this company. The rule adopted by the Commissioner of Revenue, under the advice of this office, was that incomes derived from independent, if not permanent, investments by a foreign company in the stocks and bonds of other corporations located in other states was not to be included in the net income derived by the corporation from its business at large, in computing the net income to be allocated to North Carolina.

We submit, therefore, that as the record is made up, this cannot be suggested here as an adequate reason for holding the act unconstitutional in its application to the appellant.

We cannot define cases in which the court may resort to parol evidence to show that a particular statute is unconstitutional in its incidence upon a particular taxpayer.

We merely suggest that no court—State or Federal—including this court, has ever exercised micro-

scopic acuteness in applying the rule to cases before them. There at least must be such gross inequality as to deprive the taxpayer of his property without due process of law or to deny him the equal protection of the laws.

Respectfully submitted,

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